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In the Supreme Court of the United States of America

October Term, 1992

GEORGIA POWER COMPANY,
and
BOBBY K. WHITWORTH, CLYDE STOVALL,
and DAVID C. EVANS

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION
and
FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a lowest responsible bidder who has a property interest in award of the contract under state law can bring a claim for deprivation of its property interest under 42 U.S.C. § 1983?

2. Whether the Eleventh Circuit properly refused to grant qualified immunity to state officials where the court found that the officials refused to comply with Georgia legal directives of which they knew or should have known?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondents Pataula Electric Membership Corporation ("Pataula EMC") and Flint Electric Membership Corporation

("Flint EMC") (collectively "Respondents")[1/] hereby submit their Brief in Opposition to the Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed by Georgia Power Company ("Georgia Power") and Department of Corrections officials Bobby Whitworth, Clyde Stovall and David Evans. For the reasons set forth herein, Respondents respectfully pray that this Court deny the Petitions for Writ of Certiorari.

STATEMENT OF THE CASE

This dispute arises out of the Georgia Department of Corrections' ("DOC") selection of Georgia Power over Flint EMC and Pataula EMC as electric suppliers for two new prisons, even though the Respondents were the lowest responsible bidders for the utility contracts for the prisons.

In 1989, the DOC decided to build a new prison in Calhoun County, Georgia. Pataula EMC's Amended Complaint (Georgia Power's Appendix at 165a-166a).[2/] Thereafter, the

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1/ All parties to the proceedings below are identified in the caption of Respondents' Brief In Opposition to the Petitions for Writ of Certiorari. *See* Supreme Court Rule 14.1(b). Respondents do not have any parent companies or subsidiaries. A party with an interest in this litigation, however, is Oglethorpe Power Corporation ("Oglethorpe"). Oglethorpe was formed by its 39 electric cooperative members, including Flint EMC and Pataula EMC, to supply their generation and transmission needs. *See* Supreme Court Rule 29.1.

2/ Respondents will hereinafter refer to Georgia Power's Appendix as follows: "(App. at ____a)."

DOC received bids from Pataula EMC and Georgia Power for the provision of electric service to the prison. (App. at 166a). Pataula EMC's proposal for electric service constituted the lowest responsible bid, being substantially lower in both cost per kilowatt hour and estimated annual operating cost. (App. at 166a). Under Pataula EMC's bid, the electric bill for the Calhoun County Prison would be approximately $35,000 less during the first year of operation than under Georgia Power's bid. (App. at 166a). Additionally, Pataula EMC's bid would save the DOC at least $16,800 a year in equipment leasing costs during the first ten years and at least $57,600 a year thereafter. (App. at 166a).

As part of its process of evaluating the proposals to supply electricity to Calhoun County Prison, the DOC asked consulting engineers Rosser Fabrap International ("Rosser Fabrap") to review the proposals submitted by Georgia Power and Pataula EMC. (App. at 167a). After reviewing the proposals, Rosser Fabrap recommended Pataula EMC because of its lower operating costs and lower lease costs. *See* Exhibit A to Pataula EMC's Amended Complaint (App. at 174a-177a). Despite Pataula EMC's lower bid and Rosser Fabrap's recommendation, DOC officials Whitworth, Stovall and

Evans[3/] ("DOC Officials") awarded the contract for electric service to the prison to Georgia Power. (App. at 167a).

Another bidding opportunity for a prison arose in 1990 when the DOC approved construction of a prison in Macon County, Georgia. Flint EMC's Amended Complaint. (App. at 138a). Georgia Power and Flint EMC submitted bids for electric service to the prison, and once again the EMC was the lowest responsible bidder for the contract. (App. at 138a-139a). The estimated cost under Flint EMC's bid was approximately $35,000 less during the first year of operation than under Georgia Power's bid. (App. at 139a).

The DOC again turned to consulting engineers Rosser Fabrap to review the proposals from Georgia Power and Flint EMC. (App. at 139a). After reviewing the proposals, Rosser Fabrap recommended Flint EMC because of its lower operating costs and superior service. *See* Exhibit A to Flint EMC's Amended Complaint (App. at 147a-152a). The DOC Officials again ignored the cost savings to Georgia taxpayers and awarded Georgia Power the contract for electric service for the Macon County Prison. (App. at 139a-140).

3/ Pataula EMC's Complaint names David C. Evans as a defendant because Mr. Evans was Commissioner of the DOC when Pataula EMC and Georgia Power submitted bids to the DOC for the electric utility contract at issue. Mr. Evans, however, had resigned as commissioner before Flint EMC sought to obtain the contract at issue in Flint EMC's Complaint. Therefore, Flint EMC did not name Mr. Evans as a defendant.

The Respondents filed separate complaints challenging the DOC Officials' unlawful award of electric utility contracts to Georgia Power. In their complaints, as amended, the Respondents contend that Georgia procurement statutes and regulations require the DOC Officials to award the utility contracts to the lowest responsible bidder. (App. at 138a, 166a). *See* O.C.G.A. § 50-5-51(1) (1990); Georgia Vendor Manual, Art. VIII, § 3 (App. at 62a, 107a). In such situations, Georgia law recognizes that the lowest responsible bidder has a legal entitlement or property interest in award of the contracts. *See Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 538, 266 S.E.2d 157, 161 (1980). The DOC Officials' refusal to award the utility contracts to the Respondents, the lowest responsible bidders, has deprived the Respondents of their property interest, legally protected by 42 U.S.C. § 1983 (1988). (App. at 141a-143a; 168a-170a). The Respondents seek injunctive and monetary relief for the DOC Officials' deprivation of the Respondents' property interest. (App. at 141a-144a, 168a-171a). The Respondents also seek damages based on the DOC Officials' violations of the State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-81 (1990 & Supp. 1992), and the procedures of the Georgia Vendor Manual. (App. at 144a-146a, 171a-173a).

Georgia Power and the DOC Officials moved to dismiss the Respondents' amended complaints for failure to state a

claim for which relief might be granted (Fed. R. Civ. P. 12(b)(6)). The DOC Officials also requested dismissal on the basis of the defense of qualified immunity.

The District Court for the Northern District of Georgia, Judge Horace T. Ward, consolidated the two cases for pre-trial proceedings and granted Georgia Power's and the DOC Officials' motions to dismiss the consolidated cases. Order of the Court dated November 20, 1990 (App. at 21a-30a). The District Court held that under Georgia law a disappointed bidder may possess a constitutionally protected property interest in award of a contract with the state. However, the District Court found that unlike other state purchases, electric utility contracts were not governed by Georgia's bidding laws. On that basis, the District Court concluded that the Respondents had not demonstrated a property interest in award of the contracts. The Respondents appealed to the Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit reversed and remanded. *Pataula Elec. Membership Corp. v. Whitworth*, 951 F.2d 1238 (11th Cir. 1992) (App. at 1a-12a). The Eleventh Circuit interpreted Georgia law as requiring that electric utility contracts, like other state purchases, be awarded to the lowest responsible bidder. Accordingly, the Eleventh Circuit ruled that Respondents have a property interest in award of the utility contracts at issue, and Respondents have stated a claim under

42 U.S.C. § 1983 for deprivation of that interest. *Id.* at 1242. The Eleventh Circuit also refused to grant the DOC Officials qualified immunity. *Id.* at 1244.

REASONS FOR DENYING THE PETITIONS FOR WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE A FINAL DECREE HAS NOT BEEN ISSUED IN THIS CASE.

The Petitions for Writ of Certiorari of Georgia Power and the DOC Officials (collectively "Petitioners") should be denied because a final decision has not been rendered in the case. This Court has emphasized that certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted). The lack of finality in the underlying case may "of itself alone" serve as grounds for denial of certiorari. *Id. See also Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (Supreme Court denied certiorari "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court.").

The Supreme Court's refusal to accept certiorari until a final decree has been entered serves important purposes. First, waiting until final resolution of the case promotes judicial

efficiency by allowing all claims relevant to a case to be presented in a single petition. Second, the Supreme Court may be relieved from addressing important constitutional questions, depending on the final resolution of the case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) ("The Court will 'not anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). Accordingly, the Petitions of Georgia Power and the DOC Officials, sought well before a final decree in the case, should be denied.

II. FEDERAL COURT DECISIONS DO NOT CONFLICT AS TO SECTION 1983 DISAPPOINTED BIDDER CLAIMS.

Georgia Power contends that certiorari should be granted because "there is a great deal of confusion in the lower federal courts" regarding a section 1983 challenge by an unsuccessful applicant or bidder for a state contract. Georgia Power's Petition for Writ of Certiorari, p. 9 ("Georgia Power's Petition"). The starting point for analysis of a section 1983 claim by a disappointed bidder is this Court's description of a property interest in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

> [Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent

> source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

In the cases cited by Georgia Power in pp. 9-10 of its Petition, the federal courts undertook the analysis of a property interest described in *Roth*. After examining the applicable state statutes and regulations, certain of the courts determined that the applicable state law did not create any property interest or entitlement in award of a contract. *See, e.g., Peterson Enters., Inc. v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, No. 89-3347 (6th Cir. Nov. 29, 1989) (1989 U.S. App. LEXIS 17818) (Ohio state law did not create in a bidder a legitimate claim of entitlement to award of the contract.); *Curtis Ambulance, Inc. v. Board of County Comm'rs*, 811 F.2d 1371 (10th Cir. 1987) (Applicable Kansas law did not give the bidder a constitutionally protected property interest in award of the contact.); *Sowell's Meats & Servs., Inc. v. McSwain*, 788 F.2d 226 (4th Cir. 1986) (South Carolina law did not confer a property interest on unsuccessful bidders for public contracts.); *Coyne-Delany Co. v. Capital Dev. Bd.*, 616 F.2d 341 (7th Cir. 1980) (A potential supplier had no property interest under Illinois law in having its product purchased or specified.); *Ara Servs., Inc. v. School Dist.*, 590 F. Supp. 622 (E.D. Pa. 1984) (Applicable Pennsylvania law did not grant a

bidder any legitimate claim of entitlement to award of a public contract.); *City of Atlanta v. Ashland-Warren, Inc.*, No. C81-106a (N.D. Ga. Aug. 20, 1981) (LEXIS, Genfed library, Dist. file) (Federal law did not vest a bidder with a property interest in award of a contract.); *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F. Supp. 625 (E.D. Pa. 1980) (Under Pennsylvania law, a disappointed bidder does not have a property interest in award of the contract because the requirement that a contract be awarded to the lowest responsible bidder is solely for the protection of the taxpayers.). *Cf. Estey Corp. v. Matzke*, 431 F. Supp. 468 (N.D. Ill. 1976) (District court did not examine Illinois law to determine if state law created a property interest, and court held, without discussion, that a property interest may not be vindicated under 42 U.S.C. § 1983.).

Other courts, after examining the applicable state law, have found that state law created a property interest in the lowest responsible bidder. *See, e.g., L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985); (Arkansas law created a protected property interest in the lowest responsible bidder if its bid complied with bid specifications.); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981) (Pennsylvania statutory provisions created a property interest in award of a cable franchise for the lowest responsible bidder.); *Kendrick v. City Council*, 516 F.

Supp. 1134 (S.D. Ga. 1981) (Georgia municipal regulations could create a property interest in a bidder, but the bidder must allege facts sufficient to state a claim for deprivation of his property interest.); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980) (Pennsylvania law vested in the lowest responsible bidder a property interest in award of the cable television contract.).

The federal court decisions cited by Georgia Power do not conflict simply because federal courts are interpreting different state laws and finding that some statutory provisions create a property interest while other statutes do not. This Court should not grant certiorari simply to parse Georgia competitive bidding statutes and regulations to determine whether these provisions create a property interest.

III. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE LOWER COURTS' INTERPRETATION OF GEORGIA STATUTES AND REGULATIONS.

In its Petition for Writ of Certiorari, Georgia Power fails accurately to characterize what Respondents are seeking in the underlying action. Respondents claim a property interest in award of the utility contracts at issue pursuant to Georgia's competitive bidding statutes and regulations. Georgia Supreme Court decisions have recognized that the lowest responsible bidder for a state contract may have a property interest in award of that contract. *See Hilton Constr. Co. v. Rockdale*

County Bd. of Educ., 245 Ga. 533, 266 S.E.2d 157 (1980); *City of Atlanta v. J. A. Jones Constr. Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990) (Georgia Supreme Court recognized that an injured bidder has a cause of action for failure to obtain the bid, but the bidder's damages are limited to bid preparation costs), *cert. denied*, 111 S. Ct. 2042 (1991).

While emphasizing the competitive nature of the process, Georgia Power ignores the entitlement created by Georgia law. Georgia statutes and regulations mandate that state contracts shall be awarded to the lowest responsible bidder.[4/] An entitlement to award of the contract arises under the mandatory language of the Georgia competitive bidding provisions. In this case, the Eleventh Circuit found that Georgia's statutes and regulations dictate that electric utility contracts shall be awarded to the lowest responsible bidder.[5/]

4/ The applicable Georgia competitive bidding provisions do not simply prohibit awards to "insiders or friends of State officials," as contended by Georgia Power. *See* Georgia Power's Petition p. 15. Further, the state of Georgia's decision to require contracts to be awarded to the lowest responsible bidder is a sound policy in times of runaway budget deficits.

5/ The Georgia competitive bidding provisions permit a state official to reject any and all bids. *See* O.C.G.A. § 50-5-67(b) (Supp. 1992). Thus, a state official can solicit bids and then decide not to contract for a specific purchase. Nevertheless, once a state official decides to award a contract, the official must follow competitive bidding requirements and award the contract to the lowest responsible bidder. *See* O.C.G.A. § 50-5-67(b) (Supp. 1992); Georgia Vendor Manual, Art. VIII, § 3. (App. at 72a, 107a). *See also, Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101 (N.D. Ga. 1990).

Georgia Power conveniently fails to cite a section of the Attorney General's opinion which confirms the mandatory nature of the competitive process in Georgia:

> [O]nce DOAS [Department of Administrative Services] has considered all relevant factors, it must award the contract to the lowest bidder meeting its standards. DOAS may not award a contract to a higher bidder if the products are equal in view of all relevant factors.

Op. Ga. Att'y Gen. 74-16, at 30 (1974). (App. at 133a). Thus, Georgia's competitive bidding requirements create for Respondents a property interest in award of the contracts.

The Eleventh Circuit did not, as Georgia Power contends, find that the "presence of criteria to guide state officials was sufficient to give rise to an entitlement." Georgia Power's Petition, p. 14. The Eleventh Circuit found that certain objective factors to be considered under Georgia law in choosing a lowest responsible bidder did not negate the mandatory language of Georgia's competitive bidding provisions.[6/] *Pataula*, 951 F.2d at 1242-43. (App. at 8a-9a).

6/ Under O.C.G.A. § 50-5-67(b) (Supp. 1992) and the Georgia Vendor Manual, Art. VIII, §3, the DOC Officials must consider certain objective factors such as price, performance and capacity to perform of the bidder, quality of merchandise offered, transportation charges and date of delivery.

Moreover, where discretion is granted, it cannot be abused by the state official. *Id.* at 1243. (App. at 11a).[7/]

The District Court's dismissal of Respondents' claims and the Court of Appeals' reversal turned on an interpretation of Georgia's state purchasing laws. The District Court found that those laws did not apply to electric utility contracts; the Eleventh Circuit disagreed and reversed. An interpretation of state statutes and regulations is not an "extraordinary" issue warranting Supreme Court review. The Supreme Court should not grant certiorari to duplicate the Eleventh Circuit's analysis of state statutes and regulations.

IV. THE SUPREME COURT HAS NOT RULED THAT POSSESSION IS REQUIRED FOR THE CREATION OF A PROPERTY INTEREST.

Georgia Power contends that an entitlement pursuant to state statutes and regulations only arises after a person has acquired or possesses the specific benefits. Georgia Power's Petition, p. 8. The Supreme Court has refused to adopt this limitation on due process rights. In *Board of Pardons v. Allen*, 482 U.S. 369, 374-75 (1987), this Court ruled that an applicant for parole may have a liberty interest in parole

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7/ *Cf. Regents of University of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (Supreme Court upheld district court's evidentiary finding that the University did not act arbitrarily in dropping Ewing from medical school program).

release, depending on the parole rules and regulations. The Montana parole statute in *Allen* used "mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id.* at 377-78, (quoting *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979) (footnote omitted). This Court found that the Respondents had a liberty interest in or entitlement to parole release pursuant to the mandatory language of the Montana statute, even though the Respondents had not acquired or possessed parole or its benefits. 482 U.S. at 381. *See also Greenholtz*, 442 U.S. at 12 (expectancy of parole release provided in Nebraska's parole statute was entitled to some measure of constitutional protection).

The same reasoning that applies to a liberty interest in a parole release would also apply to a property interest in award of a contract. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("This analysis as to liberty parallels the accepted due process analysis as to property.") Thus, possession should not be required to create a property interest.

Furthermore, the Respondents' claim is not based on the contention that the state officials could have made a better decision. The limited judicial question considered by the Eleventh Circuit was whether Respondents stated a claim based on a violation of mandatory provisions of state law. This

question is entirely consistent with other § 1983 decisions and will not give rise to a legion of cases in which federal courts are second-guessing state officials, as contended by Georgia Power.

V. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER A SUBSTANTIVE DUE PROCESS ARGUMENT NOT RAISED IN THE COURT OF APPEALS.

Georgia Power raises for the first time the argument that the deprivation of Respondents' property interest does not rise to the level of a constitutional violation. Georgia Power did not raise this argument before the Eleventh Circuit, and this argument should not serve as a basis for granting certiorari. *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783 n.14 (1980) ("[W]e would not normally allow a party to make an argument it had not raised below . . . .").

Georgia Power bases its substantive due process argument on a First Circuit decision, *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 112 S. Ct. 1151 (1992). In the *PFZ* case, a real estate developer was denied a construction permit by a state agency in Puerto Rico. The developer brought a section 1983 action, alleging that the agency's continued refusal to grant its permit deprived the developer of its procedural and substantive due process rights. Under First Circuit precedent, rejections of development

permits did not implicate substantive due process law. Georgia and Eleventh Circuit decisions, however, have not reached the same conclusion as to a property interest in award of a contract. *See Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980); *Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101 (N.D. Ga. 1990).

Moreover, the First Circuit does not reference any mandatory guidelines which required the permit to be granted. The case appears to be a typical permit situation, with no requirement that the agency "shall issue" a permit to the applicant. In contrast, the DOC Officials were required by Georgia statutes and regulations to award the electric utility contracts to the lowest responsible bidders. Thus, the *PFZ* decision is not applicable to the issues in this case.

VI. THE ELEVENTH CIRCUIT PROPERLY DENIED THE DOC OFFICIALS' CLAIM OF QUALIFIED IMMUNITY.

The DOC Officials ask this Court to grant certiorari to review the Eleventh Circuit's refusal to dismiss, on grounds of qualified immunity, the damages claims against the DOC Officials in their individual capacities.[8/] The Eleventh Circuit's

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8/ The qualified immunity defense only protects a defendant from damages claims against the defendant in his individual capacity. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.34 (1982). Thus, qualified immunity is not a defense to the Respondents' claims for injunctive relief against

(continued...)

analysis of the application of qualified immunity complies with federal precedent. The Eleventh Circuit evaluated the actions of the DOC Officials under a reasonable person standard. "[G]overnment officials . . . generally are shielded [by the doctrine of qualified immunity] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[9] *See also Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (defense of qualified immunity turns on objective legal reasonableness of action).

The Eleventh Circuit found that the State of Georgia's competitive bidding statutes and regulations clearly mandate that procurers such as the DOC Officials must award contracts to lowest responsible bidders whenever possible. (App. at 12a). The DOC Officials obtained competitive bids from Respondents and Georgia Power, but the DOC Officials refused to award the contracts to Respondents, the lowest responsible

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8/(...continued)
the DOC Officials. The DOC Officials in their Petition for Writ of Certiorari fail to acknowledge this distinction.

9/ The DOC Officials incorrectly contend that the law is not clearly established for qualified immunity purposes unless previously decided by the Supreme Court or the Eleventh Circuit. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (For a qualified immunity defense to apply it must be shown that "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or . . . the law clearly proscribed the actions the defendant . . . took.").

bidders. Since 1980, the Georgia Supreme Court has recognized that a lowest responsible bidder has a constitutionally protected property interest in award of a contract under Georgia competitive bidding statutes and regulations. (App. at 12a). *See Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980). The Eleventh Circuit concluded that the DOC Officials, by ignoring statutory and regulatory competitive bidding directives, knew or should have known that they deprived the Respondents, as lowest responsible bidders, of a property interest.

This case does not merit certiorari simply to have the United States Supreme Court substitute its analysis of the defense of qualified immunity under the facts of this case for that of the Eleventh Circuit. Further, analysis of the defense is not of such national importance to warrant review by the Supreme Court.

The DOC Officials misconstrue the holding in *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986). In that case, the Supreme Court noted that a magistrate is more qualified than a police officer in making a probable cause determination for issuing a warrant. *Id.* If the magistrate issues a warrant, when no officer of reasonable competence would issue the warrant, the magistrate's action is "an unacceptable error indicating gross incompetence or neglect of duty." *Id.*

Nevertheless, a police officer must exercise his own reasonable professional judgment when seeking the warrant. An officer cannot rely on the greater incompetence of the magistrate to excuse his own conduct. Thus, the defense of qualified immunity applies only if the officer's own actions do not satisfy a standard of objective reasonableness.

This holding does not translate into a general rule that a state official is protected by qualified immunity for his illegal actions if a judge or magistrate makes an erroneous ruling. The actions of the DOC officials alone must be judged against the standard of objective reasonableness. The Eleventh Circuit's evaluation of the DOC Officials' actions do not warrant a writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Georgia Power's and the DOC Defendants' Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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